The Solicitors' Journal

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CURRENT TOPICS

Sir Douglas Garrett

SIR DOUGLAS GARRETT was chairman of the Council of The Law Society in a notable year, and the splendid tribute paid to him by the Council of The Law Society in their resolution of 25th July (printed in the *Law Society's Gazette* for August) is in every way well merited. It stated: "The Council desire to express to Sir Douglas Garrett their sincere thanks for the devoted service which he has given to the profession and for the wise and helpful manner in which he has guided the Society's affairs during his year of office as President of The Law Society. The special features which have marked that year have included the holding of an Anglo-French Legal Conference, the setting up of a Joint Committee with the General Council of the Bar, and the successful outcome, after a century, of the Society's efforts to secure the abolition of the duty on practising certificates. The dignity, tact, experience and untiring energy which Sir Douglas has at all times brought to bear on the problems which have arisen have contributed in no small measure to the great successes which have been achieved, and the thanks of the whole profession are due to him for the way in which he has upheld in full measure the highest traditions of his office."

Sir Francis Watson

THE death of Sir FRANCIS WATSON on 27th August at the age of eighty-three deprives the public and the solicitors' profession in particular of a notable figure. Himself the eldest son of a solicitor, Mr. Thomas Adam Watson, J.P., he spent his whole life in the service of the family firm, Messrs. Watson, Son and Smith, of Bradford, of which he eventually became senior partner. He was knighted in 1919 and from 1923 to 1929 he was Conservative Member of Parliament for the Pudsey and Otley Division of the West Riding of Yorkshire. Among the public offices which he held were the chairmanship of the Bradford Conservative Association (1919, 1924), the chairmanship of the Bradford Distress Committee under the Unemployed Workers' Act since 1905, and the office of military representative of Bradford under the Military Service Act in the 1914–18 war. From 1899 to 1907 he was a member of the Bradford City Council. In 1938, after thirty-four years of service as a justice of the peace, he announced his intention to resign in order to make room for younger men. The late Sir Francis Watson's life and works provide a high example to younger men.

Arbitration Law and Exports

AT a time when our existence seems to depend on increasing our export trade, every proposal the adoption of which might result in the removal of obstacles to trade must be explored, and not the less carefully because it has been already tendered many times. One which obviously deserves immediate attention has been repeated by Sir LYNDEN MACASSEY, K.C., in the correspondence columns of *The Times* of 27th August. "Arbitration," he wrote, "is everywhere the overseas buyer's expedient for speedy and decisive determination of contractual disputes . . . Outside England parties to commercial contracts can legally agree that an arbitrator or an arbitration tribunal shall be their exclusive and final judge." Sir Lynden referred in particular to Canada, the U.S.A., Latin America, Scotland and Sweden as countries where this is the law. No such agreement is valid in England, Sir Lynden continued, and a dispute may remain undetermined while it is carried through all its stages of appeal from a master in chambers to the House of Lords. Even when the award is made the chain of litigation may recommence before a judge. The criticisms of this system by the 1938 Amsterdam Conference of the International Law Association, by Maître JAMES PAUL GOVARE in an address this year to the Institute of Arbitrators and by Maître JACQUES QUARTIER at the recent Anglo-French legal conference in The Law Society's Hall, emphasise the necessity of re-examining this branch of the law. Sir Lynden recommends the passing of a single-clause statute to the effect that, where parties to a commercial contract so agree, they may refer a dispute arising under the contract to the final determination of an arbitrator, s. 9 of the Arbitration Act, 1934, shall not apply, and the court shall have no power to set aside an award for "an error of law appearing on the face of it."

Training in Child Welfare

THE sadness, both from the point of view of the individual and that of society, of the case of the unwanted child without a home, is not unknown to solicitors acting in divorce cases. The breaking up of home life which has been an unhappy feature of the last few years has aggravated the problem. It will be remembered that the Curtis Committee, in its report last year, recommended the appointment of a training council, and emphasised the urgent need to raise the standard of child care by attracting to the work women of the right personality, and giving them suitable training. It is welcome news that the Home Office has taken an important practical step to that end by appointing a Central Training Council in Child Care to organise courses and to select candidates for training for work with children who have been deprived of a normal home life. Arrangements are being made with certain universities and local education authorities to start later this year two types of training course—(1) for boarding out officers who will supervise the care of children placed in foster

homes, and (2) for house mothers in children's homes. Hitherto there has been no special provision for the training of persons in charge of children in small cottage or independent homes, although the abnormality of the circumstances under which the children live demands expert knowledge as well as character in those who have the charge of them. This serious defect in the upbringing of our citizens of the future is now to be remedied.

War Damage Value Payments

THE War Damage Commission has notified the Council of The Law Society that unless claimants to shares of value payments have notified the Commission by 1st October of the amount of their shares, they cannot be paid this year, and they must expect a delay of at least eight weeks after they notify the Commission. The information has already been called for three times, but only 20 per cent. of the claimants involved have responded, although the Government has fixed 10th November, 1947 (S.R. & O., No. 1571), as the starting date for making value payments. In an extract from the Commission's letter, published in the August issue of the *Law Society's Gazette*, the detailed preparation required for calculating the actual amount payable is carefully explained, and it is pointed out that the first bulk issue on 10th November must be limited in the main to cases now with the Commission, but will include the great majority of cases where there is a single proprietary interest. If the volume of work justifies it, a second bulk payment will be made in mid-December, and for inclusion in this payment cases must reach the Commission before 1st October. The letter states that the Commission's work will be greatly assisted if claimants or their professional advisers will see that wherever possible the agreed shares reach the Commission in advance of that date.

Betting in Northern Ireland

A RECENTLY published report by a Home Office committee on betting in Northern Ireland makes sweeping proposals for the reform of the whole of the law relating to betting and lotteries. Nine members signed a majority report, and six signed a minority report. The majority think that the existing law, making the keeping of offices open for cash betting illegal, is out of date and cannot be enforced, and recommend the licensing of a certain number of bookmakers' offices, for a maximum licensing fee of £200, to keep open for cash betting during specific hours. The minority report is opposed to any legal sanction being given to betting. Both the majority and the minority reports are agreed that the existing law forbidding the collection of bets in streets and public places should be retained and extended in certain respects. The majority report is in favour of retaining the present legality of football pool betting, subject to steps being taken to fix the amount to be deducted by the promoter in respect of profit, expenses, etc., taking the view that the people who indulge in it regard it as a source of entertainment. The minority report regards the pools as pernicious, and recommends their complete prohibition. Both reports agree that machines used purely for gaming should be prohibited. The majority report does not propose any change with regard to greyhound racing tracks, but the minority report considers that they should only be permitted under the strictest conditions by licence from the local authority, and with the consent of the residents in the area. The majority report considers that the legalisation of cash betting should make a betting tax a feasible proposition. The minority are against the State deriving any revenue from betting. The majority are in favour of legalising small ballots and sweepstakes held in connection with bazaars, clubs, etc., but the minority suggest the complete prohibition of all lotteries. Five members favour the legalising of totalisators; ten are against it.

Road Research

WE dare not relax in our efforts to diminish the tragic massacres on the roads of this country, and it is the duty of every citizen, especially of every lawyer whose profession leads him to study the causes of road accidents, to become acquainted with the contents of a report of British scientists who visited North America last year to study road conditions there. The report has been published by the Department of Scientific and Industrial Research (H.M. Stationery Office, 1s. 6d.). Research facilities, staff and finances are on a much bigger scale there than here. Practical methods are used, such as the checking of licence plates, interviews with drivers stopped at the roadside, house-to-house calls and the study of driving speeds, of "passing techniques" and of "parking techniques." In 1944, 24,300 people were killed and 850,000 injured on the roads of North America, these figures being about two-thirds of the figures reached before the war. The delegation was impressed by the extent to which pedestrians were subjected to regulations. In many cities they must cross the streets at the proper crossing places and wait for their traffic signal. In Portland, first offenders are sent to a traffic school and second offenders are fined. On the other hand, in Ontario a driver involved in a fatal accident has to undergo a new driving test if he has had less than one year's experience, or if he is over seventy years of age. Another precautionary method which has been fruitful in results as regards road safety has been the compulsory inspection of vehicles. This is particularly necessary in a country of vast distances where heavy traffic must be allowed to travel at high speeds. Allowing for all the differences in the population, extent and traffic conditions of the territory examined from those in this country, this report constitutes one of the most impressive contributions to road research ever made.

Priority Distribution of Building Materials

ON 7th August, 1947, the Minister of Works made the Control of Building Materials (No. 1) Order, 1947 (S.R. & O., 1947, No. 1698), relating to the priority distribution of materials and components. The order schedules the materials and components to which the system shall apply, and these include building bricks, commons and facings in quantities of not less than 1,000, certain gutters, pipes and fittings, hardwall plaster and plasterboard, certain domestic types of baths, lavatory basins and sinks, certain types of lead sheet and pipe, and of copper pipe, certain types of domestic, solid fuel, burning, heating and cooking appliances, certain kinds of clear sheet glass and certain electrical fittings. In brief, as from 1st September, 1947, it will be an offence to seek to acquire or to offer to supply in respect of a priority certificate quantities in excess of those authorised by that certificate; and as from 1st October, 1947, to supply against a non-priority order whilst a current priority order remains unfulfilled. The order affects priority certificates issued under the present scheme as well as the new certificates. A full explanatory memorandum on the revised scheme for priorities has been circulated, with the order, to all local authorities. Circular 140/47, issued by the Ministry of Health to local authorities on 25th August, states that within the limited range of materials covered by the new order, local authorities will be responsible for a measure of control, but it is not intended that local authorities shall be responsible for investigation of offences against the order, and any necessary action will be taken by the Ministry of Works.

Exchange Control Act, 1947

NOTICES which are, at a date to be announced, to supersede existing notices, have been issued by the Bank of England on behalf of the Treasury, setting out the procedure to be observed for handling, transferring and collecting the income, etc., from registered and bearer securities. Solicitors, in common with other residents in the United Kingdom, must

deposit with "authorised depositories" all bearer securities and securities registered outside the Scheduled Territories which are held by them either for their own account or for account of clients. The documents constituting or evidencing title to such securities must themselves be formally deposited, i.e., they may not be retained in locked receptacles lodged with authorised depositories. Solicitors have been included in the class of "temporary recipients" of bearer securities after consultation with the Council of The Law Society, in order to provide for occasions when solicitors may need to handle deposited securities (e.g., for proof of death, etc.). They will be entitled to withdraw securities from authorised depositories on condition that they are re-deposited within one calendar month. They may be passed on to another temporary recipient, who must then accept responsibility for re-deposit within the calendar month. Copies of the notices may be obtained from the Bank of England, but generally all the necessary information will be obtainable by solicitors from their bankers. The July issue of the *Law Society's Gazette* contains a list of temporary recipients.

An Advocate

A RECENT issue of the American magazine *Life* (26th May, 1947) contains a detailed portrait of a famous advocate of the U.S.A., LLOYD PAUL STRYKER, picturesquely described in a sub-title as "archetype of vanishing courtroom virtuoso." The legal profession, as is well known, has not developed in America in the same way as here. The article discloses that "most U.S. lawyers to-day spend most if not all their time in offices and law libraries, and much of the work they handle never gets into court." There appears to be a slight misunderstanding of the situation over here, for the writer says: "They are what the British, with a touch of contempt, call 'solicitors' . . . we call our barristers trial lawyers; we do not train them specially, and most of our Bar, by contrast to Britain's, rates them a lesser breed." We trust there is as little truth in this rating of the Bar in U.S.A. as there is in the alleged touch of contempt about the term "solicitor" here. However, Stryker, like Dewey, Darrow, Choate and hosts of other American "trial lawyers," is a man whose life and works prove that he is no mere virtuoso, but a great practitioner of a great art. The best advice to the budding advocate is to study the lives and sayings of his great predecessors, and one of the wisest of Mr. Stryker's sayings will at once be appreciated: "Find the facts before you think about the law at all." A story of his resource in an emergency will be an inspiration to all advocates whose inclination for the dramatic is liable to overreach itself. Having climbed a ladder to demonstrate to a jury that it was perfectly safe, he decided to jump on it, whereupon it collapsed. "You see, gentlemen," said Stryker quietly, "a big fellow like me had to jump on it with all his weight to break it."

Recent Decision

In *R.* v. *H.M. Secretary of State for Foreign Affairs and H.M. Secretary of State for the Colonies; ex parte Greenberg and Others*, on 29th August (*The Times*, 30th August), JENKINS, J., refused a motion for a writ of habeas corpus in respect of immigrants on a ship which arrived in Palestinian waters and was taken in charge by the British Government and returned to Port de Bouc, France, under a deportation order made by the High Commissioner for Palestine under the Palestine (Emergency) Regulations, 1945. His lordship held that the High Commissioner had power not only to make the deportation order but also to make it effective, and it therefore must extend to the placing of the persons affected by the order on a ship outward bound, on the footing that they were to be conveyed to that ship's destination wherever that might be. His lordship said that since the immigrants refused to land in France they were now, of their own choice, on the way to the ship's next destination.

RECENT SALE OF GOODS CASES

BEGINNING his judgment in the case of *Couchman* v. *Hill* [1947] 1 All E.R. 103, Scott, L.J., is reported as remarking on the fact that appeals from the county court "so often present features of great interest, whether of law or of practical importance to the community, and also raise quite difficult problems for solution by the court." The moral for practitioners in the county court is obvious. No less than those engaged in High Court litigation, they must know their law. Indeed, for solicitors the responsibility of giving sound legal advice is probably the more onerous the smaller the value of the subject-matter. Resort to counsel is generally quite impracticable in small matters.

The case in question will afford such solicitors and others a good opportunity for refurbishing their acquaintance with an important part of the law of contract—that relating to representations, conditions and warranties. The facts were that the catalogue at an auction sale of cattle contained the following words: ". . . all lots must be taken subject to all faults or errors of description (if any), and no compensation will be paid for the same." There was also set out the following among the conditions of sale: "The lots are sold with all faults, imperfections and errors of description, the auctioneers not being responsible for the correct description, genuineness or authenticity of, or any fault or defect in, any lot, and giving no warranty whatever." The plaintiff was interested in a lot described in the catalogue as "two red and white stirk heifers, unserved." He took the precaution before the actual sale, but when the heifers were in the ring, of asking both the defendant (the seller) and the auctioneer whether they could confirm that the heifers were unserved, and from both he received an affirmative answer. The plaintiff bought one of the heifers. However, less than two months afterwards the heifer suffered a miscarriage, and three weeks later died as a result of having carried a calf at too young an age. The plaintiff claimed damages from the seller for breach of warranty. On the one hand the county court judge found that the plaintiff would not have bought the heifer had he had any reason to doubt that it was in fact unserved, but on the other hand there was no suggestion that at the time of the sale either the auctioneer or the defendant did not honestly believe that it was unserved. His honour held the action barred by the stipulations and conditions in the sale catalogue, and the plaintiff thereupon appealed, arguing: (i) that the language of the sale documents was effective only to protect the auctioneer personally and afforded no defence to the defendant if he would otherwise be liable for the mis-statement in the catalogue; and (ii) that the warranty in the catalogue was in fact confirmed verbally by both the auctioneer and the defendant in reply to the plaintiff's enquiry.

Before coming to the judgment of the Court of Appeal on these contentions, it may not be amiss to recapitulate and discuss briefly one or two broad propositions relating to the subject in order that we may see the matter in perspective.

(1) A representation made by one party to another before the formation of a contract between them may or may not form part of the contract. The intention of the parties is the sole key. The leading case of *Heilbut Symons & Co.* v. *Buckleton* [1913] A.C. 30, makes it clear that the mere fact that a representation, innocently made, operates on one party as an inducement to enter into a contract, will not incorporate it into the contract in such a way as to give the party so induced any right of action for damages on his discovering that the representation is untrue.

(2) Assuming that the parties intend that the subject-matter of the representation shall become part of the contract, the further question then arises, also dependent entirely on the intention of the parties, whether it becomes a condition going to the root of the contract and entitling the party affected, upon discovering its falsity, to repudiate the contract *in toto*, provided that it has not already been partially executed in his favour (*Behn* v. *Burness* (1863), 3 B. & S. 751), or whether

it is merely a collateral matter, a warranty, sounding in damages while not relieving the party from performance of the contract (*Bettini* v. *Gye* (1876), 1 Q.B.D. 183). Repudiation under this principle must be carefully distinguished from the remedy of rescission which may arise in some circumstances where even an innocent misrepresentation is shown to have induced the contract, provided that the *status quo ante* can be restored (*Adam* v. *Newbigging* (1888), 13 App. Cas. 308), and that no third party has been affected in his rights (*Oakes* v. *Turquand* (1867), L.R. 2 H.L. 325). In the case of rescission the contract has been performed, and the party misled is entitled to have it set aside (compare *Thorne* v. *Smith* [1947] 1 All E.R. 39, *per* Scott, L.J., at p. 41); the breach of a condition on the other hand excuses the performance of the contract itself. It follows that if the contract has been performed, the right of repudiation is lost and the proper remedy is in damages: the condition has "sunk" to a warranty.

(3) The party affected by breach of a condition may, in any case, if he chooses, waive the breach; or he may waive it as a condition and merely sue in damages as if the breach were of a warranty.

(4) Though a condition should fall to be treated as a warranty, whether on the election of a party or by performance of the contract, it nevertheless remains a condition as a matter of nomenclature, and is accordingly not excluded by a term in the contract that the sellers give no warranty (*Wallis* v. *Pratt* [1911] A.C. 394); though an express term excluding "all express and implied conditions, statements and warranties, statutory and otherwise," is naturally effective (*L'Estrange* v. *Graucob* [1934] 2 K.B. 394).

To return to *Couchman* v. *Hill*, Scott, L.J.'s is the only full judgment in the Court of Appeal. The learned lord justice was against the plaintiff's first contention, *supra*, holding that the words quoted above from the conditions of sale were to be incorporated as terms of the contract as between the seller and the buyer when the hammer fell. Obviously, then, so far as the plaintiff's claim depended on the statements in the catalogue, it must fail, since the word "unserved" amounted to an error of description and was expressly protected by the printed conditions. (Compare the proposition numbered (4) above.)

In his further argument, however, the plaintiff was successful. As Scott, L.J., points out, at the moment when the conversations took place between the plaintiff and the defendant and the auctioneer, there was no contract in existence, but merely an announcement that the auctioneer, with the authority of the sellers, was about to make auction offers of certain lots on the published terms of sale. It was in law open to any would-be purchaser to intimate in advance that he was not willing to bid for any particular lot except on modified terms. Scott, L.J., puts the real question in this way, and our proposition (1) will enable us to appreciate the force of the passage: "What did the parties understand by the question addressed to and the answer received from both the defendant and the auctioneer? It is contended by the defendant that the question meant 'having regard to the onerous stipulations which I know I shall have to put up with, if I bid and the lot is knocked down to me, can you give me your honourable assurance that the heifers have, in fact, not been served? If so, I will risk the penalties of the catalogue.' The alternative meaning is: 'I am frightened of contracting on your published terms, but I will bid if you will tell me by word of mouth that you accept full responsibility for the statement in the catalogue that the heifers have not been served, or, in other words, give me a clean warranty. That is the only condition on which I will bid'." His lordship thought that the only proper inference was that the question was asked and answered with what he had called the alternative meaning. It followed that "there was an oral offer of a warranty which overrode the stultifying condition in the printed terms, that offer was accepted by the plaintiff when he bid, and the contract was made on that basis when the lot was knocked down to him."

On this point we may contrast the old case of *Hopkins* v. *Tanqueray* (1854), 15 C.B. 130, in which the facts bear a superficial resemblance. But there the conversation between the parties took place the day before the auction sale of a horse, and while the plaintiff, who subsequently bought the animal, was examining its legs. According to the report the defendant, the owner of the horse, said to the plaintiff: "The animal is perfectly sound." Upon which, the plaintiff replied: "If you say so, I am satisfied," and made no further examination. It was held that the statement of the owner was a mere expression of belief, and as both parties knew that the contract was to be made at the auction next day and that it was not to contain a warranty (*sic*), neither party intended the representation to form part of the contract. Incidentally, here, as elsewhere in the older cases, the word "warranty" is obviously used to describe what we have called a condition (see proposition (2)).

There was, indeed, discussion in *Couchman* v. *Hill* as to whether the description "unserved" constituted a warranty or a condition. Scott, L.J., thought that as a matter of law "every item in a description which constitutes a substantial ingredient in the identity of the thing sold is a condition, although every such condition can be waived by the purchaser, who thereon becomes entitled to treat it as a warranty and recover damages" (see proposition (3)). Tucker and Bucknill, L.JJ., agreed, and the appeal was allowed.

It may, perhaps, be respectfully suggested as a matter for discussion whether the plaintiff in the present case may properly be said to have waived the condition. Had not the contract been carried out and the condition sunk, irrespective of any choice on the part of the plaintiff, to the level of a warranty?

Express representation is not, of course, the only way in which conditions and warranties can arise. A familiar instance is that of the conditions implied, in the absence of any contrary stipulation, by ss. 12–15 of the Sale of Goods Act, 1893. One of these has also recently been illustrated in a reported decision—*Spencer Trading Co., Ltd.* v. *Devon* (*Fixol and Stickphast, Ltd.*, third parties) [1947] 1 All E.R. 284. The condition in question in that case was that under s. 14 (1) of the Act, by which: "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose," with a proviso excepting articles sold under patent and trade names.

The report concerns the case presented against the third parties by the defendants, who satisfied the claim of the plaintiffs arising out of the supply of fly-papers which proved to be ineffective for their purpose on account of the nature of the gum used in their preparation. The defendant was a manufacturing chemist who made the fly-papers, using a substance ordered from the third parties under the description of fly-gum. The third parties, who used a note-heading which held them out as suppliers of gum and other adhesives, had previously supplied the defendant with a perfectly satisfactory fly-gum, and Hilbery, J., found as a fact that it was in the course of their business to supply goods of this description. This was so notwithstanding that they were not making up gum for this particular purpose every day. In other words, goods can belong to a description within the seller's general course of business although they take a special form in a particular instance.

In the events which happened, however, the third parties were unable to supply, in fulfilment of the defendant's second order, gum of the same kind as had been previously supplied, and they had to substitute a gum made of synthetic as opposed to natural materials. The first sale appears to have been by sample, but on this second occasion the manufacturers, believing (as the learned judge found) that they had discovered an effective substitute, did not send a sample. This sale, then, was one to which s. 14 (1) applied, since it was common

ground that the defendant had made known the purpose for which he wanted the gum. Hilbery, J., thought that the circumstances clearly showed that he was relying on the third parties to make up a substance which was suitable for that purpose.

The result was that there was a breach of the statutorily implied condition that the goods should be reasonably fit for the purpose for which they were required, and the defendan succeeded against the third parties. It may again be observed that the condition had dropped in status to the equivalent of a warranty because the contract had been carried out, so that repudiation was impossible as well as inappropriate. Accordingly, the liability of the third parties was in damages only.

CRIMINAL LAW AND PRACTICE

AGREED COSTS OF SOLICITOR ADVOCATE IN CRIMINAL PROCEEDINGS

THE Law Society rightly found it necessary, in a letter to the *Western Mail* of 19th August, to correct a statement by the legal correspondent of that newspaper with regard to fees charged by solicitor advocates for their appearances in court on behalf of clients.

The learned Recorder of Cardiff had referred to this matter, and The Law Society made a statement, with which the newspaper's legal correspondent expressed agreement, that a solicitor can charge whatever he likes.

In his article in the *Western Mail* on 12th August the correspondent wrote that in his judgment the Society would have done a great service to the general public if they had further explained that such charge may be reviewed by the court. He said that the client has the right to apply to the court for an order that the solicitor should deliver a bill of costs and have it taxed by the proper taxing officer.

The court, he said, can set aside a bargain for a lump sum, by taxation assess a reasonable amount to be paid to the solicitor and order any surplus to be repaid to the client. The cost of taxation, wrote the correspondent, is ridiculously small.

Mr. E. H. V. McDougal, Assistant Secretary of The Law Society, replied that the question which the Society discussed with the learned Recorder was whether it is in accordance with the usual practice for a solicitor to agree for a fee to undertake a defence in police court proceedings in an indictable case. The Law Society had replied that this practice was usual, and the Recorder thereupon expressed his regret that on an earlier occasion he had so expressed himself as to leave in doubt the professional reputation of the solicitor concerned.

It would, Mr. McDougal added, have been an impertinence for the Society to have informed the Recorder of the fact, well known to every lawyer, that solicitors' charges can be submitted to taxation by the court.

With regard to the suggestion that solicitors' charges are likely to be more than is fair and reasonable and that the costs of taxation are "ridiculously small," Mr. McDougal wrote that the fact is that, unless a client is successful in having his solicitor's bill reduced on taxation by at least a sixth, the client will find himself liable for the costs of the taxation, "which may not in fact be ridiculously small."

The latest contribution to the controversy before this goes to press came from "Magistrate," who wrote, in a letter to the same newspaper of 23rd August :—

> "When a man asks a solicitor to defend him, the solicitor in effect becomes the 'man of business' of his client, and should surely not advise his client to spend so much on his defence before the magistrates as to leave him without means to provide for his defence before the jury, should he be committed for trial.
>
> Furthermore, if a defendant insists, contrary to his solicitor's advice, on spending so much money on his defence in the magistrates' court, is it fair that the ratepayers should be called upon to pay for his defence at the sessions or assizes?"

No one can disagree with these very proper sentiments, and most solicitors follow them in practice.

As is well known, the law on the subject is laid down in ss. 59 to 63 of the Solicitors Act, 1932. The effect of these sections is that a solicitor may make an agreement in writing with his client as to his remuneration in respect of any contentious business done or to be done, including remuneration by a gross sum.

"Contentious business" includes any business done by a solicitor in any court, whether as a solicitor or advocate (s. 81 (1)).

Under s. 60 (3) a client may apply to the court to set aside the agreement and order the costs to be taxed. Agreements may be reopened by the court within twelve months after payment.

Apart from this method, a solicitor's costs which have been made the subject of an agreement under s. 59 cannot be taxed. Thus, amplifying the observations made by Mr. McDougal, it is not difficult to understand why such costs are seldom queried.

COMPANY LAW AND PRACTICE

FINANCE ACT, 1947—I

IT is with considerable reluctance that reference is made in this column to the Finance Act, which is now available, but there are one or two provisions of that Act which require to be borne in mind in connection with the law relating to companies.

The first point on which I propose to touch is that well worn topic of bonus shares, disregarding, however, any question of what in fact the effect of an issue of bonus shares is, a controversial topic on which many howlers have recently been perpetrated, and merely dealing with the provisions of the Act. Those provisions are contained in the three sections, ss. 60–62.

The first of those sections imposes a charge on the issue of bonus shares and bonus rights in general terms, which are subsequently explained or amplified in the next two sections.

Section 60 then deals with two separate kinds of operations carried out by companies formed in Great Britain, and affects operations of those classes carried out after the 16th April, 1947. The first class is the issue by a company of securities by way of bonus to members of, or debenture-holders in, itself or in any other company. The second class is the variation of the rights or liabilities attached to any securities, either by increasing the amount of capital which may become payable to the holders of those securities or by reducing the amount of capital which may become payable by them, by way of bonus to the company's members or debenture-holders or to those of another company.

The existence of shares on which any capital is payable, where the shares have been in existence for some time, is now so rare that the more usual type of variation by way of bonus will be in the case of a company increasing the amount of capital payable to the holders of any securities by way of bonus to its own members or debenture-holders, or to those of another company. This latter operation would be an extremely complicated one, but it is possible to envisage circumstances in which it might be carried out.

In these provisions "securities" means shares and debentures, those words having the meaning given them by the Companies

Act, 1929. By that Act "share" means a share in the capital of the company and includes stock, and "debenture" includes debenture stock, bonds and any other securities of a company whether constituting a charge on the assets of the company or not. It will be thus seen that it will be an ingenious person who can think up anything which can be issued by a company by way of bonus, not caught by the word "securities" in s. 60.

That section provides that where any operation of the type mentioned above is carried out a statement of the fact containing the necessary particulars is to be delivered to the Commissioners, and the charge is actually imposed by subs. (2) of this section, which provides that every such statement is to be charged with *ad valorem* stamp duty of £10 per £100 of the value of the bonus.

That then is the general scheme of the charge to duty, and it will be seen that it is very general in its nature. The i's are dotted and the t's are crossed by s. 61, which is three and a half pages long and extremely complex.

Subsection (1) excludes from the operation of the charge an issue permission for which was given under the Defence (Finance) Regulations before the 15th April, and also issues announced to the persons concerned before that date. There is also a general exemption irrespective of the time when it is made in the case of an issue by one company to the members or debenture-holders of another company as a part of a *bona fide* scheme for the amalgamation of businesses, one of which is the business of the company whose members or debenture-holders get the bonus.

The expression "by way of bonus" is explained in subs. (2), and the following subsections go on to define the value of the bonus. Securities are issued by way of bonus if the right to the securities, renounceable or assignable or not, is conferred on any class of members or debenture-holders, as such, or they are issued in pursuance of certain offers or applications.

Offers which will constitute the issue a bonus issue are offers which are made to any class of members or debenture-holders, or to all the members or debenture-holders of a company, or offers which provide special terms for those people compared with other persons. The kinds of application which will have the effect of making an issue a bonus issue are those to which preference is given when they are made by or as the result of a nomination by such persons.

It should be noted that the result of this is in theory that a bonus issue may be made, which does not confer a benefit on any class of persons. Whether or not a bonus issue takes place depends entirely on the method adopted for carrying out the issue and not on whether the bonus so defined is of any value or not. That question is dealt with in assessing the value of the bonus.

A further point which should be noted is that the question whether or not the applications are of such a nature as to constitute the issue a bonus issue is one of fact. The question is: was the right to the securities conferred on a class of members or debenture-holders as the result of applications to which preference was given "as being made by or in right of those members or debenture-holders"? This may well lead to a somewhat complicated result in the case of such offers as state that applications made on the "special pink forms," or whatever the colour is, will be given preference. If the pink forms are available to the members or debenture-holders and customers, for example, so many of the shares as go to members or debenture-holders will be issued by way of bonus and the ones which the customers, and of course the ordinary public, get, will not be so issued.

The further provisions relating to the issue of securities by way of bonus will have to be discussed next week, when the value of the bonus will also have to be considered.

A CONVEYANCER'S DIARY

THE RIGHTS OF WAY ACT, 1932

I MAKE no apology for returning to this subject once again. Apart from its seasonable character at a time when many turn their thoughts towards the countryside (where the village Hampden, or perhaps one should say nowadays the rural district council, is ever most pertinacious in asserting the existence of public rights of way), the subject is one that is full of difficulties, which the passage of the Rights of Way Act, 1932, has done little to allay. In fact, the contrary is probably nearer the truth. This is in part due to the fact that in the thirteen years since the Act came into force there have been only three fully reported decisions on it, the last of which (*A.-G. and Newton Abbot R.D.C.* v. *Dyer* [1947] Ch. 67) was the subject of comment in this "Diary" in March this year.

It is sometimes thought that the Act of 1932 forms a code for establishing public rights of way, and that the simplification it effected in the general law has made most of the old learning on the subject largely obsolete. This is far from being the case; the Act is, in fact, substantially a procedural measure, passed with the object of providing a procedure whereby, in the ordinary case, the rights of the public may be determined without the undue expense to which parties were put in adducing evidence in support of their case under the common law. The essential portion of the Act, to which the other parts are subsidiary, is in its two opening subsections, which provide as follows:—

> "(1) Where a way . . . upon or over any land has been enjoyed by the public as of right and without interruption for a full period of twenty years, such way shall be deemed to have been dedicated as a highway unless there is sufficient evidence to show that there was no intention during that period to dedicate such way, or unless during such period . . . there was not at any time any person in possession of such land capable of dedicating such way.
>
> (2) Where any such way has been enjoyed as aforesaid for a full period of forty years, such way shall be deemed conclusively to have been dedicated as a highway unless there is sufficient evidence that there was no intention during such period to dedicate such way."

The rest of s. 1 (so far as it is material to these notes) provides for determining the terminus of the periods of twenty and forty years, which are defined as ending at the time when the right of the public to use the way shall have been brought into question; and for certain notices which the owner of the land affected may put on his land, and certain communications he may make to a local authority, which in the absence of proof of a contrary intention shall be sufficient evidence to negative the intention to dedicate.

The general scheme of the Act is thus clear. It is much more concerned with procedure and the *onus probandi* than with changes in the substantive law, but even in this limited respect it closely follows the old law. The two periods of twenty and forty years respectively (which follow the example set by the Prescription Act, 1832) are not exclusive periods, in the sense that they prescribe any minimum or maximum period over which user has to be proved. The common law relating to public rights of way is unaffected by the Act of 1932, and it is still open to the litigant to invoke it in a suitable case—for example, where user cannot be established for as long as twenty years, as is often the case with rights of way over land which has been recently developed. The case of *A.-G., etc.* v. *Dyer, supra*, is in point. The relator plaintiff rested his case on (1) a contract between the local authority and the defendant which was alleged to have resulted from the compromise of a previous dispute in regard to the way in question, (2) the Act of 1932, and (3) the common law fiction of a lost grant. The learned judge found in favour of the plaintiff on the first two heads and overruled an objection on

the part of the defendant that it was not open to the plaintiff to rely on the Act of 1932 as he had not expressly pleaded it; on the third head he found that, as the affected land had been in settlement during the material period, there could have been no valid dedication by its limited owners of a right of way over the settled land.

This decision underlines the one material change which the Act of 1932 has effected: under the new law an intention to dedicate can be inferred even against a limited owner, provided that the other requirements of s. 1 (2) of the Act are satisfied. The old doctrine that dedication is a question of title, as well as of intention—as to which, see, for example, *Farquhar* v. *Newbury R.D.C.* [1909] 1 Ch. 12—is to this extent overset, and the provisions of the Settled Land Act, 1925, s. 56, which gives a tenant for life under that Act strictly limited powers of dedication, have no application where a right of way is established by user under s. 1 (2) of the Act of 1932. But it is still open to the landowner to set up the defence of absence of *animus dedicandi*, and for this purpose he is at liberty to avail himself of any relevant evidence, whether it is of the kind specifically mentioned in s. 1 of the Act (i.e., the notices or communications already referred to) or of a totally different nature. The question of fact which has to be decided in a case brought under the Act is the same as it always has been at common law, viz., whether in all the circumstances of the case an intention to dedicate a public right of way should or should not be inferred from the actions of the public on the one hand and of the landowner on the other. The presumptions which flow from user over the periods of twenty or forty years fixed by the Act are presumptions *juris*, and not *juris et de jure*, and may be rebutted. Apart from the specific provisions of s. 1 (2) of the Act, which exclude evidence of incapacity in cases coming within that subsection, the landowner can still rely on any evidence to disprove an *animus dedicandi* which was available to him under the old law. It is from this aspect, above all, that the small compass of the changes made by the Act of 1932 can most readily be realised. The common law in regard to public rights of way is far from obsolete, and it is still necessary to refer to the old cases in order to determine the vital question, from what sort of conduct an inference of dedication can be rightly drawn. There is no short cut to such knowledge provided by the Act of 1932.

LANDLORD AND TENANT NOTEBOOK

COLLATERAL PROMISE TO HEAT PREMISES

THE Furnished Houses (Rent Control) Act, 1946, has now provided us with new authority on the old, old question of collateral warranties and promises. (The two are often treated as identical, but I think it is preferable to limit the meaning of "warranty" to an undertaking relating to an existing fact.) The new decision is a majority decision of a Divisional Court, and this alone goes to show that questions of this nature are not always easy to solve.

Earlier in the year, in the course of judgments delivered in *R.* v. *Paddington and St. Marylebone Rent Tribunal, ex parte Bedrock Investments, Ltd.* [1947] 2 All E.R. 15; 91 SOL. J. 310, and *R.* v. *Hampstead and St. Pancras Rent Tribunal, ex parte Ascot Lodge* [1947] 2 All E.R. 12; 91 SOL. J. 265 (both discussed in 91 SOL. J. 335), Divisional Courts had, in no uncertain terms, laid down that rent tribunals had to take contracts as they were. "Services voluntarily rendered do not bring lettings within the Act which otherwise would not be within the Act."

What was in issue in the recent case of *R.* v. *Croydon, etc., Rent Tribunal, ex parte Langford Property Co., Ltd.* [1947] W.N. 238; 91 SOL. J. 435, can be said to be whether landlords voluntarily supplied hot water and heat in the following circumstances. Their tenant had, before entering into any written agreement, visited the premises, which were a flat in a block; hot water was available; he had seen outside the block a notice-board bearing the legend "Flats to let. Central heating. Constant hot water"; the letting agent referred to central heating and hot water as services supplied; and there was some correspondence which, according to the minority judgment subsequently delivered by Macnaghten, J., seemed to indicate plainly that the rent included payment for such services. The tenant told the tribunal he would not have agreed to that rent if those services had not been promised, but he had signed a tenancy agreement which said nothing about them; according to the majority judgments, the omission was deliberate.

The tribunal, having considered that there was a warranty that the landlords would provide the services and that there was a collateral agreement to supply them, by which the signing of the written agreement was induced, proceeded to exercise jurisdiction and reduced the rents, whereupon the landlords applied for an order of certiorari.

The argument advanced for the tribunal was twofold. It was first contended that there was a warranty. This, I suggest, would be difficult to establish. The leading case on collateral warranties is undoubtedly *De Lassalle* v. *Guildford* [1901] 2 K.B. 215 (C.A.), in which a tenant obtained damages for breach of a collateral warranty that the drains of a house he was about to take were in perfect condition. What is sometimes, I believe, not fully appreciated about this case is that the lease which the tenant was induced to sign was not silent about *upkeep* of drains—they were covered by covenants—but it was silent about their *condition at the time* of the assertion made by the lessor. Thus it was that the lease did not contain the whole of the contract, and did not vary or contradict the verbal statement.

It is difficult to see how this and similar decisions, e.g., *Otto* v. *Bolton and Norris* [1936] 2 K.B. 46—verbal assurance given to purchaser that house was well built—can affect the question whether, in the words of s. 2 (1) of the Furnished Houses (Rent Control) Act, 1946, a contract has been entered into whereby one person grants to another person the right to occupy as a residence a house or part of a house in consideration of a rent which includes payment for the use of furniture or for services.

In one respect, it would seem more probable that a disappointed tenant would be able to succeed by proving a verbal promise by his landlord to do certain things. But this probability has to be discounted when one remembers how much a lease or tenancy agreement may say about what is to be done as compared with what it may say about what has been done. I think that, as far as landlord and tenant are concerned, three cases in which evidence of lessors' verbal promises to destroy rabbits was admitted and the promises held binding (*Barrow* v. *Ashburnham* (*Lord*) (1835), 4 L.J.K.B. 146; *Morgan* v. *Griffith* (1871), L.R. 6 Ex. 70; and *Erskine* v. *Adeane* (1873), L.R. 8 Ch. 756) are the only authorities on which a tenant can rely. *Mann* v. *Nunn* (1874), 43 L.J.C.P. 241, in which effect was given to a landlord's oral promise to put the premises into a condition fit for habitation, was doubted in *Angell* v. *Duke* (1875), L.R. 10 Q.B. 174, where the premises were let furnished and the alleged promise was to supply additional furniture. The tenant was not allowed to prove such promise: the lease expressed the whole of the terms and the arrangement made could not be called collateral. It may be of some importance that, while in all these cases the statement made by or for the landlord related to something to be done, in the three rabbit cases and in *Mann* v. *Nunn* that "something" can be regarded as a single act which would affect the enjoyment rather than the extent of what was let. In the case of additional furniture, the performance of the promise would in effect alter the parcels; while if a promise to render services were to be enforced it would mean at least an additional and continuing obligation.

The majority of the court, then, held that the agreement was not collateral; but Macnaghten, J., considered that on

the facts, including the correspondence, an agreement should be implied "to supply those services as far as reasonably possible." This, it may be observed, is not exactly what tenant and tribunal had striven for and found; it would seem that the learned judge would have imported into the tenancy agreement some such obligation as "to use their best endeavours" frequently found in modern leases providing for hot water and heating (see 89 SOL. J. 78). Fundamentally, the difference between this view and that adopted by his lordship's colleagues may be one of inference; for Macnaghten, J., said that there was no doubt that the provision of central heating and hot water in fact enhanced the rent, while Goddard, L.C.J., and Lynskey, J., thought that the omission from the written agreement was deliberate.

In more than one of the cases mentioned above, rectification has been mentioned as a possible remedy, and I propose to discuss the possibilities in my next article.

TO-DAY AND YESTERDAY

LOOKING BACK

A SOCIAL history of England could be written entirely from the pages of the law reports and the assize calendars, a history well in keeping with the modern taste for investigating the personal habits of our ancestors (including our fathers in the law) rather than confining attention to matters of high policy and the things of the state. Legal and social problems illuminate each other. We see how men arranged their lives, to what temptations they most often succumbed, what they believed in; even their hypocrisies show what current standards made it worth their while to pretend to believe in. This day, 6th September, what legal doings were to the fore in 1690? A letter of that date in that interesting collection, the Portledge Papers, tells us: "This was our sessions week at the Old Bailey, when a parson of the Church of England was convicted and fined 500 marks for writing a scandalous book in answer to the Bishop of Salisbury's pastoral letter. Also two highwaymen were tried and condemned, who, after sentence, gave the court very reproachful language and they bidding the executioner tie them up, as the usual manner is, they struck him to the ground in the face of the court and, he endeavouring to do it a second time, they again did the like. Upon which they were manacled and carried to Newgate. The executioner hath eaten many times at my table; his father is living and my friend and second brother to a family of as good repute as most in Devon. I blush to name him."

SANCTUARY

THE war has seen in some degree a revival of the mediæval idea of sanctuary, the peace of God protecting the fugitive in the House of God. Men on our side of the conflict sought and found it and, of course, by the very nature of the idea, so did men on the other side. The matter was recalled by a recent trial in Paris, when seven French priests, tried for having sheltered Germans during the hostilities, pleaded the ancient duty of granting sanctuary. Though they were found guilty, the plea evidently carried some weight with the court, for they were given only suspended prison sentences and fined sums ranging from £10 to £25. The Public Prosecutor, in the course of the proceedings, observed that the right of sanctuary was abolished in France in 1675. In England, sanctuary in the case of felony was abolished in 1623 by the Statute 21 Jac. I, c. 28, s. 7. Sanctuary in the case of debt lingered on as an unhallowed ghost for another hundred years. Sanctuary started reasonably enough, the Church protecting the lives of fugitive suspects from summary vengeance, canon law and common law both approving. Originally the system touched cases of felony only but later on debtors in danger of arrest were accorded the same privileges as suspected felons, since imprisonment too may endanger life. And what happened to the refugee once he had gone to earth? Boarded and lodged and wearing an appropriate badge he was given forty days to confess his crime before the King's coroner and to swear to abjure the realm. He was then assigned a port of embarkation whither he must proceed without delay or deviation to sail into exile. If he refused to confess and abjure, he was not cast out of the sanctuary though divers persuasive devices were employed to decide him to do the correct thing.

TRANSFORMATION AND END

THE suppression of the monasteries under Henry VIII, of course, shook the whole system of sanctuary to its foundations. How it worked at that time may be gathered from the correspondence relating to the suppression of Beaulieu Abbey. There were "here sanctuary men for debt, felony and murder, thirty-two of them, many aged, some very sick; they have all of them wives and children and dwelling-houses and ground whereby they live. They have lamentably declared that if they are sent away, they shall be utterly undone." According to another letter "the miserable debtors far steeped in age of long continuance, loden with wives and children, must be compelled to beg . . . The whole inhabitants of Beaulieu, few excepted, be sanctuary men. The murderers and felons will incontinently and without further suit as hopeless men depart, the rest debtors of good behaviour and right quiet among their neighbours." These, it is pleasant to know, were allowed to continue where they were. A statute of 1540 abolished all but seven sanctuaries, Wells, Westminster, Northampton, Manchester (afterwards transferred to Chester), York, Derby and Launceston. These survived till the Act of 1623 made an end of all sanctuaries so far as crime was concerned. Debtors, however, continued to have their places of refuge, and whole areas of London were given over to colonies of desperate men and women banded together in an unholy alliance to thwart and defy sheriffs, bailiffs and debt collectors. Whitefriars or "Alsatia," stretching from Fleet Street to the river and from the Temple almost all the way to St. Bride's, is best remembered, but it was only one of many. An Act of 1697 purported to abolish "all such sanctuaries or pretended sanctuaries," but it took two more statutes in 1722 and 1724 to complete the process finally and effectually.

WHAT IS A SOLICITOR'S PRACTICE WORTH?—II

(CONTRIBUTED)

IN an earlier article (91 SOL. J. 457) the general principles applicable to the valuation of goodwill in relation to a solicitor's practice were discussed. In this concluding article the special features of partnerships, one-man practices and specialist practices are considered.

(*a*) *A Partnership.*—Ordinarily least difficulty is found where the valuation concerns a practice in which all the existing partners remain. If, however, as is often the case, a partner is retiring or has died, a valuation is required so that a member of the firm who is leaving or the legal personal representative of a deceased partner may be paid or allotted a fair proportion of the goodwill; while if a new partner is contemplated a valuation of the goodwill of the practice may be necessary so that the incoming member can be made to buy (pay in) his share of the concern's existing goodwill. Under such conditions the valuation may be quite different from a valuation in other circumstances. The only value attached to goodwill is that which will remain in the business after the partner has withdrawn.

It is conceivable, therefore, that a personal (professional) practice, of which one partner is the main attracter of profitable business, may have a very valuable goodwill *while that partner is in the concern* and that after his severance, the goodwill may be reduced to a mere fraction of what it was. Many a client will consult Mr. *A* because he has much faith *in him* (not necessarily in the firm), though while Mr. *A* is a member of the firm the other partners may enjoy more confidence than if he were not associated with them, because clients feel that Mr. *A* would only be connected with men of his own type and calibre and that he will see that all work done by the practice is of a high standard. To his clients Mr. *A is* Messrs. *A, B* and *C* (not merely Mr. *A*), and if the partnership were dissolved and Mr. *A* joined another firm or started a new practice of his own, his clientele would, to a large extent, follow him. If he died, his clientele would die too so far as the practice was concerned. This is a vital factor in the valuation of the goodwill of the practice, whether it be for the purpose of determining the goodwill item as an asset in the balance sheet of a continuing practice (without change) or of calculating the share of an outgoing member, but that factor operates in different directions according to which of those circumstances obtain.

The following hypothetical illustration relates to a firm *A, B and Co.*, of which *A* is the predominant partner, not merely because of the amount of his (money) capital invested therein, nor by reason of the number of hours he devotes to the work, but because he attracts clients in consequence of his known or believed skill, his attractive and strong personality, his associations and his influence. It will be assumed that he is the cause of one-half of the business income. The illustration assumes two different circumstances—the first, that Mr. *A* will remain in the practice; the other, that he has retired or died.

Illustration No. 1.—(All partners remain in the practice.)

	£	£
Gross fees of the practice in the year ended 31st March, 1947		12,690
Deduct—Working expenses—rent, rates, insurance, lighting, heating, travelling, stationery, postages, telephone charges, salaries of employees, etc.	4,302	
Interest on capital—		
A on £10,000 @ 4% £ 400		
B on £5,000 @ 4% £ 200		
C on £3,000 @ 4% £ 120		
	720	
Equivalent salaries of partners—		
A £1,500		
B £ 950		
C £ 850		
	3,300	
		8,322
"Super-profits" for the year ended 31st March, 1947		4,368
Add—Corresponding figures for year ended 31st March, 1946		3,643
Corresponding figures for year ended 31st March, 1945		3,748
Corresponding figures for year ended 31st March, 1944		3,251
Corresponding figures for year ended 31st March, 1943		2,608
Total "super-profits" for past five years		17,618
Average "super-profits" per year		3,524
Number of "years' purchase," say 4, thus making a goodwill value of the practice of		14,096
	(say)	£14,000

Apportionable as follows—*A* ½ equals £7,000
B ¼ „ £3,500
C ¼ „ £3,500
£14,000

If partner *A* (who was deemed to be the means of attracting one-half of the income of the practice) retired or died on 31st March, 1947, a valuation of goodwill as at that date would not be £14,000, nor necessarily even one-half of that sum, since income would start to fall considerably after the severance of *A's* connection with and his services in the partnership, while establishment charges could not be reduced in the same proportion. The valuation of goodwill in such circumstances might be as follows:—

Illustration No. 2.—(Partner *A* retiring or deceased.)

	£	£
Estimated income for the year ended 31st March, 1947, if partner *A* had not been there, say		6,395
Deduct—Working expenses (estimated at)	3,000	
Interest on capital—		
B on £5,000 @ 4% £200		
C on £3,000 @ 4% £120		
	320	
Equivalent salaries of partners—		
B £950		
C £850		
	1,800	
		5,120
Carried forward		£1,275

Brought forward:	£
Estimated "super-profits" for the year ended 31st March, 1947	1,275
Add—Corresponding figures for the year ended 31st March, 1946	1,072
Corresponding figures for the year ended 31st March, 1945	994
Corresponding figures for the year ended 31st March, 1944	1,120
Corresponding figures for the year ended 31st March, 1943	826
Total (estimated) "super-profits" for the past five years	5,287
Average (estimated) "super-profits" per year	1,057
Number of "years' purchase," say 5 (the contingency of losing the principal partner now of no consequence for present purposes) thus making a goodwill valuation of the practice of	5,285
	(say) £5,000

Apportionable as follows—*B* ½ equals £2,500
C ½ „ £2,500
£5,000

The apportionment in illustration No. 1 would hold good only while partner *A* remained in the practice. On his severance he or his legal personal representatives would not be entitled to £7,000 in respect of goodwill because he would not have left that value of goodwill in the practice. In effect, he would have destroyed it or taken it away.

A problem that often arises in a case such as this is—how much is the retiring partner entitled to and what is the value of the goodwill of the practice after the severance? The first part of the query is really this—how much is *A* leaving in the business that is wholly due to his influence? It is not easy to determine the value, and the most equitable course seems to be a re-assessment of the goodwill after partner *A* has left and (subject to anything in the partnership agreement) the allocation to him of only such proportion of that figure as could be attributed to his influence when in the partnership. If none, the valuation shown in illustration No. 2 would be applicable; but if it could be agreed that *A's* connection left its mark to the extent of, say, a quarter of the whole, the apportionment would be as in illustration No. 3, making *A* or his legal personal representatives entitled to one-quarter of £7,500 (i.e., £1,875) to be provided and paid by *B* and *C* equally.

Illustration No. 3.—(Partner *A* retiring or deceased, the value of his association left in the practice being estimated at one-quarter.)

	£	£
Estimated income for the year ended 31st March, 1947		7,981
Deduct—Working expenses (estimated)	3,000	
Interest on capital—		
B on £5,000 @ 4% £200		
C on £3,000 @ 4% £120		
	320	
Equivalent salaries of partners—		
B £950		
C £850		
	1,800	
		5,120
Estimated "super-profits" for the year ended 31st March, 1947		2,861
Add—Corresponding figures for the year ended 31st March, 1946		1,268
Corresponding figures for the year ended 31st March, 1945		1,242
Corresponding figures for the year ended 31st March, 1944		1,400
Corresponding figures for the year ended 31st March, 1943		1,032
Carried forward		£7,803

	£
Brought forward :	
Total (estimated, adjusted) "super-profits" for the past five years	7,803
Average (estimated, adjusted) "super-profits" per year	1,561
	(say) 1,500
Number of years' purchase, say 5, making a goodwill valuation of	£7,500

Apportionable as follows—A ¼ equals £1,875
B ⅜ ,, £2,813
C ⅜ ,, £2,812

£7,500

After payment of the £1,875 to A or his representatives by B and C (provided by them in equal proportions) the value of the goodwill would be apportioned as follows :—

B £3,750
C £3,750

£7,500

The answer to the second part of the query (above) is that the new estimated value of the goodwill remaining in the business (£5,000 or £7,500) should be revised yearly on the basis of the period from the date of the readjustment. The main point here sought to be emphasised is that it would be wrong to assume the value of the goodwill as £14,000 (as in illustration No. 1) and to give the retiring partner a large proportion of that sum.

(*b*) *A One-man Practice.*—The factors to be taken into consideration when valuing the practice of one individual are, to a large extent, similar to those operating in the case of a partnership, but in some respects the problem is more difficult. For instance, as has been pointed out previously, the personal attributes cannot be passed on to a successor and so the goodwill is of comparatively little concern, though there may be some factors of value such as arise from situation, virtual monopoly and so on.

Apart from the question of personality of the individual, it may be that work comes through channels which would not be open to a successor. These include the business of personal friends, through church, institution and social associations, and life-long "advertising" of the unofficial, yet valuable, kind.

The wide experience of an "old hand" obviously cannot be transferred to a tyro. As soon as it is shown that a new owner lacks his predecessor's breadth of experience, the clientele of the practice may diminish.

In the case of a purchase or sale of a practice from or by a sole principal who is to retire at an early date, other things being equal, the value of the goodwill is ordinarily very small. A multiplier of 2 may be ample in most cases—perhaps excessive.

If there is one circumstance in which the goodwill is less in value (again, other factors being equal) than in all others, it is on the occasion of the death of a sole principal. Not only are there all the disadvantages previously mentioned which arise from the inability to pass on personal attributes and the like, but the former principal is not available to advise or explain anything which is not spontaneously clear. In such a case a multiplier of 1 or 2 seems ample, unless there are exceptionally favourable circumstances.

(*c*) *Specialist Practice.*—The problem of specialisation cannot safely be left out of consideration by would-be purchasers of a legal practice. As years have passed, specialisation in all professions has taken place to a great extent. While a large partnership may have in it several members who have become experts in special phases, a small practice may be one which, while being ostensibly "general," is really noted for one or two special features almost to the exclusion of others, just as a physician or surgeon may be a specialist in a department of medicine or surgery. Unless in such a case the prospective proprietor can step into the same line of service, with ability equal to that of the vendor, the probability of retaining the latter's connection and of maintaining the reputation of the practice is not good.

COUNTY COURT LETTER

Greater Hardship

In *Barge* v. *Bell*, at Bournemouth County Court, the claim was for possession of a bungalow. The plaintiff was a gardener, and his case was that, although a claim made six months previously had failed before Judge Cave, K.C., a change of circumstances had arisen. Having sold certain properties for £1,600, the plaintiff was living on the proceeds in furnished rooms, for which he was paying £3 a week. He had been unable to obtain employment with a cottage—contrary to Judge Cave's anticipation. The plaintiff was also unable to take a full-time job, owing to rheumatism. The defendant's case was that he and his wife had a daughter, aged eight years, who was suffering from tuberculosis. It would be a greater hardship if they were homeless. His Honour Judge Armstrong gave judgment for the defendant, with costs.

In *Batt* v. *Owen*, at Stourbridge County Court, the claim was for possession of two rooms, required for the plaintiff's daughter, son-in-law, and baby aged sixteen months. The three were at present occupying one small bedroom in the plaintiff's house. The defendant was aged eighty, and his case was that his wife had recently died, and he needed looking after. His sister-in-law and her son were therefore living with the defendant. His Honour Judge Langman gave judgment for the defendant, with costs.

Cancellation of Holiday Booking

In *Cammish* v. *Rous*, at Bridlington County Court, the claim was for damages for breach of contract. The plaintiff was a postman, living in Hull, and his case was that he booked rooms at the defendant's boarding-house, for himself and his wife, for the first fortnight in September at £3 10s. a week. The plaintiff paid a deposit of £2, but the defendant returned this on the 17th August, and recommended alternative accommodation. The plaintiff wrote to the other address, but had no reply. He and his wife had to spend the first week of their holiday at home and the second week at Filey. It cost them £1 to make the arrangement and £1 for the accommodation. The case for the defendant was that she could not fulfil the booking, as her premises had been turned into a catering establishment. His Honour Judge Kingsley Griffith observed that a holiday had a monetary value. Judgment was given for the plaintiff for £7 and costs.

POINTS IN PRACTICE

Questions from solicitors who are REGISTERED ANNUAL SUBSCRIBERS are answered without charge, on the understanding that neither the Proprietors nor the Editor, nor any member of the staff, are responsible for the correctness of the replies given or for any steps taken in consequence thereof. All questions must be typewritten (in duplicate), addressed to the Editorial Department, 88-90, Chancery Lane, W.C.2, and contain the name and address of the subscriber, and a stamped addressed envelope.

Income Tax—Post-war Credits—Whether Capital or Income of a Deceased's Estate

Q. We are acting in the administration of a testator's estate, whose will included the following clause : "I declare that all dividends rents income and interest received by the company (the executors) after the date of my death shall be treated as income and shall be paid to the person or persons entitled to receive the income of my residuary estate notwithstanding that some part thereof may have accrued due or may have been earned prior to my death and no part of such dividends rents income or interest shall be treated as capital." Prior to his death the testator was issued with three post-war credit certificates for the years 1941–42, 1942–43 and 1943–44, and the point which has now arisen is how to deal with the certificates, in view of the above clause and the circumstances in which the certificates were issued. The certificates were issued to represent the amount of extra tax paid in consequence of certain income tax allowances having been reduced by the Finance Act, 1941, and as the certificates represent part of the income for each year they were issued, we are inclined to the view that they should be treated as income and payable under the clause mentioned above to the beneficiaries entitled to the income of the residuary estate, in the same way as a dividend in arrear paid subsequent to the date of death would be so applied. We do not think there has been any decided case on the point, but would be glad to have your views as to whether the certificates can be properly applied as income, or whether they should be treated as part of the capital of the testator's estate.

A. We do not know of any authority upon this point. We would observe that the amounts which have been or will be refunded represent a slice of income or notional income received *prior* to the death, being a refund of tax on such income. Although, therefore, the amounts have been or will be actually received since the death, we think it very doubtful indeed whether they fall within the clause in the will. Indeed, we are disposed to think that they do not.

REVIEWS

Digest of Land and Property Cases, 1946. Reported in the *Estates Gazette* from 1st January—31st December. Edited by C. WILLIAM SKINNER, of Lincoln's Inn, Barrister-at-Law. 1947. London: The Estates Gazette, Ltd. 25s. net.

The prejudice against reports not made by qualified barristers is dying down, and those which appear in the *Estates Gazette* and nowhere else have been cited not only in county courts but in the Supreme Court without any objection being taken. The 1946 edition of that paper's Digest, covering decisions under a variety of statutes affecting landowners, from compulsory purchase measures to War Damage Acts, from rating to rent control (including furnished lettings under the Furnished Houses (Rent Control) Act, 1946), is a valuable addition to the library of any practitioner concerned with such matters.

"Charis" and "Gold, Hate and Love." Two poems. By T. K. WIGAN, of Lincoln's Inn, Barrister-at-law. Ilfracombe: Arthur H. Stockwell, Ltd. 3s. 6d. net.

There is a strong sense of moral and religious purpose in these two poetic allegories by a practising member of the English Bar, formerly a judge of the High Court of Ethiopia. In form and content they turn resolutely away from the whole spirit of modernism back to older moods of thought and feeling and expression, so that those who experience a literary nostalgia may well find a restfulness in their atmosphere of stately imagery and grave traditional metre.

BOOKS RECEIVED

The Complete Law of Housing. By H. A. HILL, M.A., of Gray's Inn, Barrister-at-Law, and D. P. KERRIGAN, B.L. (Edin.), of the Middle Temple, Barrister-at-Law. Fourth Edition. 1947. pp. xlvi and 828 and (Index) 52. London: Butterworth and Co. (Publishers), Ltd., and Shaw & Sons, Ltd. 37s. 6d. net.

Precision and Design in Accountancy. By F. SEWELL BRAY, F.C.A., F.S.A.A. 1947. pp. 145. London: Gee & Co. (Publishers), Ltd. 15s. net.

An Introduction to International Law. By J. G. STARKE, B.A., LL.B., B.C.L. (Oxon), of the Inner Temple, Barrister-at-Law. 1947. pp. xiv, 293 and (Index) 23. London: Butterworth and Co. (Publishers), Ltd. 25s. net.

Amalgamations, Transfers of Engagements, Disputes, Investigations and Dissolutions. Building Society Administration No. 4. By A. E. SHRIMPTON, Solicitor of the Supreme Court. 1947. pp. 78. London: Franey & Co., Ltd., for the Building Societies Institute. 3s. net.

Burke's Loose Leaf War Legislation. Edited by H. PARRISH, Barrister-at-Law. 1946–47 Vol., Pts. 10, 11 and 12. London: Hamish Hamilton (Law Books), Ltd.

Murder Most Foul. A study of the road deaths problem. By J. S. DEAN. 1947. pp. 114. London: George Allen and Unwin, Ltd., for the Public Affairs News Service. 3s. 6d. net.

Britain and her Export Trade. Report of an address delivered by Mr. Leslie Gamage, M.C., M.A. 1947. pp. 8. London: The Chartered Institute of Secretaries. 6d. net.

The Industrial Law Review. Vol. 2, No. 3. August, 1947. 2s. net.

Theobald on the Law of Wills. Tenth Edition. By J. H. C. MORRIS, B.C.L., M.A., of Gray's Inn, Barrister-at-Law. 1947. pp. lxxiv and (with Index) 639. London: Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd. 55s. net.

Design of Accounts. By F. SEWELL BRAY, F.C.A., F.S.A.A., and H. BASIL SHEASBY, F.C.A., F.S.A.A. Second Edition. 1947. pp. viii and (with Index) 270. London: Oxford University Press. 12s. 6d. net.

Spicer and Pegler's Income Tax. Seventeenth Edition. By H. A. R. J. WILSON, F.C.A., F.S.A.A. 1947. pp. xxxiv and (with Index) 721. London: H. F. L. (Publishers), Ltd. 25s. net.

Ranking, Spicer & Pegler's Executorship Law and Accounts. Sixteenth Edition. By H. A. R. J. WILSON, F.C.A., F.S.A.A. 1947. pp. xxx and (with Index) 436. London: H.F.L. (Publishers), Ltd. 25s. net.

The ABC International Airways and Shipping Guide. August (mid) – September (mid), 1947. London: Thomas Skinner and Co. (Publishers), Ltd.

NOTES OF CASES

HOUSE OF LORDS

Glasgow Corporation *v.* Bruce or Neilson

Lord Simon, Lord Thankerton, Lord Porter, Lord Oaksey and Lord MacDermott. 28th July, 1947

Master and servant—Common employment—Transport undertaking—Injury to conductress of omnibus through negligent driving of following omnibus—Ordinary traffic risk.

Appeal from a decision of the Court of Session (Lord Justice-Clerk Cooper and Lord Stevenson; Lord Mackay dissenting) reversing a decision of the Lord Ordinary.

The plaintiff, who claimed damages for personal injuries, was employed by the defendant corporation as a conductress on a motor omnibus on service No. 19. That omnibus was run into from behind by another of the corporation's omnibuses engaged on service No. 2. The leading bus having had to apply its brakes to avoid a pedestrian, the following bus, which was close behind, skidded into the former on the ice-bound road, the plaintiff being injured. The driver of the following omnibus put in no defence to the plaintiff's claim for damages for negligence. The corporation admitted that the collision and consequent damage were caused by the driver's negligence, but pleaded that he and the plaintiff were fellow employees engaged in a common work. The House took time for consideration.

LORD SIMON said that in *Miller* v. *Glasgow Corporation* (1946), 63 T.L.R. 42, the collision had occurred between two of the corporation's tramcars engaged in the same service and following the same uphill route on the same pair of rails. If danger of collision between them arose, neither car could avoid it by lateral movement, for each car could move only along the same fixed grooves. It was that circumstance which led the House to take the view, affirming the Court of Session, that the risk of collision was not merely the ordinary risk arising from contiguity in traffic of two vehicles, but that the injured party serving on one tram had a special interest in the skill and caution of the driver of the other tram who was his fellow servant. Every case in that branch of the law depended on its own facts, and fine distinctions were inevitably involved; but in the present case it appeared to him that the majority of the judges in the Court of Session were right, for the risk which the plaintiff was running from the careless driving of another vehicle which was moving close behind her own omnibus did not in the least depend on the fact that the vehicle in connection with which the risk arose was another omnibus of the corporation. It might be pointed out (without expressing any view whether the difference would be material) that the two omnibuses were not drawing up one behind the other at an appointed stopping place, but were both using the road in course of ordinary transit. *Kerr* v. *Glasgow Corpn.* [1945] S.C. 335 (where the colliding buses were within the precincts of a large garage), indicated that such refinements might be important; but the collision here was a risk of the road which might equally well have arisen if the vehicle which ran into the plaintiff's omnibus had belonged to somebody else. In other words, the plaintiff had no "special interest" in the skill and caution of the driver of the following omnibus arising out of the relationship between them, but was a victim of a risk of the road which might equally well have arisen from the negligent conduct of any driver of any vehicle moving close behind her. The appeal would be dismissed.

The other noble and learned lords concurred.

COUNSEL: *J. L. Clyde*, K.C., *R. H. Sherwood Calver*, K.C., and *R. Smith Johnston* (all of the Scottish Bar), for the corporation; *Hector McKechnie*, K.C., and *J. H. Shearer* (both of the Scottish Bar), for the plaintiff.

SOLICITORS: *Martin & Co.*, for *Simpson & Marwick*, W.S., Edinburgh; *Herbert Smith & Co.*, for *J. & R. A. Robertson*, W.S., Edinburgh.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

COURT OF APPEAL

Short and Another *v.* Treasury Commissioners

Tucker, Somervell and Evershed, L.JJ. 22nd July, 1947

Emergency legislation—Crown's compulsory acquisition of company—Compensation of shareholders—Method of valuing shares—Defence (General) Regulations, 1939 (*S.R. & O.*, 1939, *No.* 927), *reg.* 78.

Appeal from a decision of Morris, J. (91 SOL. J. 85).

In 1943 the Government decided to take over the business of Short Brothers (Rochester and Bedford), Ltd., under reg. 78 (1) (*b*) of the Defence (General) Regulations, 1939. By a Treasury Order, dated 31st May, 1943, the price to be paid for the ordinary

and "A" ordinary shares was fixed at 29s. 3d. a share. The claimant shareholders, the appellants, being dissatisfied with that valuation, claimed under reg. 78 (7) that the value of their shares should be determined by arbitration. By reg. 78 (5) the price to be paid by a competent authority in respect of any shares transferred by virtue of an order made under the regulations was to be "a price which, in the opinion of the Treasury, is not less than the value of those shares as between a willing buyer and a willing seller." Before the arbitrator the claimants contended that the price of their shares should be fixed by first ascertaining the value of the undertaking as a whole and then determining the proportionate value of the separate classes of shares and individual shares within each class. On that basis they claimed a price of 41s. 9d. a share. The Treasury contended that the correct method of valuation was to take the prices of the shares ruling on the Stock Exchange at the date of the transfer, and that on that basis the price should be 29s. 3d. a share.

MORRIS, J., held, on questions left by the arbitrator, that, on the true construction of reg. 78 (5), the Treasury's contention was correct. The claimants appealed. (*Cur. adv. vult.*)

EVERSHED, L.J., reading the judgment of the court, said that shareholders were not in the eyes of the law part-owners of the undertaking. The undertaking was something different from the totality of the shareholdings. The claimants had recognised that difficulty, and their main argument had been addressed to the alternative statement of their case, namely, that the value of their shares must be calculated on the basis of an apportionment of the value of the totality of the shares in one hand, so as to comprehend the value of the complete control thereby conferred. True, the Crown was acquiring all the shares of the company, as it was bound to do. It was, however, also the fact that it was acquiring shares from a number of individual shareholders, and *prima facie* each shareholder was entitled to receive only the value of what he possessed, for that was all that he had to sell or transfer. The court saw no reason in principle why a claimant should receive more than the value of what he had. If some third shareholder in fact held a controlling interest in the company's capital, the effect of the claimants' contention would be to appropriate to their own holdings some part of the control value which the third shareholder might well allege was an item of value belonging to him. It would require clear language in the regulation to produce such a result. The formula "as between a willing buyer and a willing seller" was a common one. In their (their lordships') opinion, when applied to a transfer of any shares, it imported, according to its ordinary and natural meaning, the conception of a separate bargain of sale by an individual seller to an individual buyer of those shares. The appeal was dismissed, and the award of 29s. 3d. a share upheld.

COUNSEL: *Sir David Maxwell Fyfe*, K.C., and *Cecil Turner*; *Sir Cyril Radcliffe*, K.C., and *H. L. Parker*.

SOLICITORS: *William Charles Crocker*; *Treasury Solicitor*.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

CHANCERY DIVISION

In re **Ridsdel**; **Ridsdel** *v.* **Rawlinson and Others**

Jenkins, J. 1st July, 1947

Administration—Judicial trustee—Audit—Disallowance of sum paid by way of compromise of a claim—Principles applicable to disallowances—Observations on the duty of judicial trustees to apply to the court for directions—Circulation of accounts to beneficiaries—Trustee Act, 1925 (15 & 16 *Geo.* 5, *c.* 19), *s.* 15 (*f*)—*Judicial Trustees Act*, 1896 (59 & 60 *Vict.*, *c.* 35), *s.* 1 (3), (4), (6)—*Judicial Trustee Rules*, 1897, *rr.* 12, 14, 15.

Adjourned summons.

The judicial trustee of a testator's estate in June, 1945, entered into an agreement to sell a yacht, which formed part of the estate, at an advantageous price; the yacht was under charter to the Ministry of War Transport. The trustee had omitted to put his title in order, and this delayed completion of the transaction until October, 1946. In the meantime the purchaser had made claims against the estate and threatened to rescind on account of failure by the trustee to complete within a reasonable time. To compromise the dispute, the trustee paid to the purchaser £223, being three months' hire received under the charter-party. The court auditor, acting under the provisions of the Judicial Trustee Rules, 1897, disallowed this item. The trustee took out a summons for an order that the item should be allowed as proper. Counsel on behalf of certain beneficiaries supported the disallowance on the grounds that (*a*) the claim by the purchaser was unfounded and the compromise improper, or, alternatively, (*b*) the necessity for compromise arose from the delay caused by the negligence of the trustee in failing to put his title in order. The Trustee Act, 1925, by s. 15 (*f*), provides that a trustee may "compromise . . . or otherwise settle any . . . claim or thing whatsoever relating to the testator's estate . . ." and may "enter into, give, execute . . . such instruments of compromise . . . as to him . . . seem expedient, without being responsible for any loss occasioned by any act . . . so done . . . in good faith." The Judicial Trustee Rules, 1897, by r. 12, provide: "(1) A judicial trustee may at any time request the court to give him directions as to the trust or its administration." By r. 15: "(1) The account of any trust of which there is a judicial trustee, with a note of any corrections made upon the audit, shall be filed as the court directs. (2) The judicial trustee shall send a copy of the accounts . . . to such beneficiaries or other persons as the court thinks proper."

JENKINS, J., said that the compromise was one which the trustee could *prima facie* properly enter into under the provisions of s. 15 (*f*) of the Trustee Act, 1925; on the evidence, the claim made by the purchaser might well have succeeded, with very detrimental results to the estate. It might be that the trustee was at fault in not having perfected his title to the yacht before entering into a contract of sale, but if such an allegation was made the proper course was for any beneficiary aggrieved to take the proper proceedings to compel the trustee to make good the resulting loss to the estate. *In re Shenton* [1935] Ch. 651 had been cited in support of the proposition that "compromise" in the Trustee Act meant compromise of a claim; that was so, but it did not follow that, to justify a compromise payment, the trustee must show that the claim would have succeeded; so to hold would be to reduce the power of compromise to a nullity. The duty of the court auditor was more than merely to see that the necessary vouchers were produced (*Thomas* v. *Devonport Corporation* [1900] 1 Q.B. 16, at p. 20, was referred to); the auditor must also disallow any payment which was on the face of it improper, e.g., the purchase of an investment which was palpably unauthorised by the trust instrument, or the payment of income to X which should have been paid to Y. But where the payment (as in the present case) was of an authorised character on the face of it, but possibly open to objection as being occasioned by negligence or other unsatisfactory conduct on the part of the trustee, the proper course was to allow the payment and insert in the account an appropriate note calling attention to the circumstances, so that any beneficiary might take action if so advised. The provisions of r. 12 (1) of the Judicial Trustee Rules, 1897, did not deprive a trustee of the power of compromise; the purpose of the Act and the Rules was to save estates the expense of a full administration by the court, and it would be defeated if a judicial trustee had to apply to the court for directions on every occasion when he had to exercise a discretion. The proper method of circulating the accounts was that (*a*) copies of the accounts, as submitted for audit, should be sent to the beneficiaries, and (*b*) copies of any alterations, corrections or comments made by the auditor should be circulated subsequently. The item in dispute must be allowed, without prejudice to any claim which any beneficiary might think fit to make against the trustee.

COUNSEL: *J. H. Stamp*; *J. L. Arnold*.

SOLICITORS: *Rawlinson & Son*; *Bower, Cotton & Bower*.

[Reported by F. R. DYMOND, Esq., Barrister-at-Law.]

KING'S BENCH DIVISION

Evans *v.* **Minister of Pensions**

Denning, J. 11th July, 1947

Pensions—Flying bomb—Factory worker—Injury while hastening to shelter on approach of bomb—Explosion of bomb elsewhere—Right to pension.

Appeal from a decision of a pensions appeal tribunal.

The appellant was employed at a factory. Warning having been given of the approach of a flying bomb, she was passing through the garage, which had a glass roof, on the way to the shelter when the noise of the approaching bomb was heard. She thereupon, with others, rushed towards the women's lavatory as being the nearest place without a glass roof. In her haste she slipped and fell, injuring her spine. The bomb passed overhead and exploded a quarter of a mile away, no one in the factory being injured. The tribunal having held that the appellant's injury was not a "war injury" within the meaning of the scheme, she now appealed.

DENNING, J., said that the question was whether the appellant's injury could be said to have been caused by the discharge of a missile by the enemy. The tribunal had thought the case governed by *Minister of Pensions* v. *Ffrench* (1946), 174 L.T. 238. In his opinion, that was an entirely different case. There there was no missile which had had any causative effect.

Here the missile had been of decisive effect. It was only if a missile had been the cause of the injuries that a case came within the scheme. The flying bomb was the cause of the appellant's injury, and her appeal would be allowed.

COUNSEL: *Montagu*, K.C., and *T. J. Kelly*; *H. L. Parker*.

SOLICITORS: *John Holt*; *Treasury Solicitor*.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Miller *v.* Minister of Pensions

Denning, J. 25th July, 1947

Pensions—War service—Cancer of the gullet—Disease of unknown origin—Attributability to war service.

Appeal from a decision of a pensions appeal tribunal.

The applicant was the widow of an officer who joined the Army in 1915 at the age of eighteen and served for thirty years until his death in 1944 at the age of forty-eight. During the war of 1939–45 he served in the Middle East from August, 1940, continuously until his fatal illness. In the middle of 1944 he was diagnosed as suffering from cancer of the gullet, that was, carcinoma of the œsophagus. He died soon afterwards. His widow was entitled to a pension on account of his long service, but she claimed the higher pension granted to widows of soldiers whose death was due to war service. The tribunal rejected the claim. She now appealed.

DENNING, J., held that the tribunal had properly directed themselves as to the burden of proof, and said that the second point of law was whether the conclusion of fact drawn by the tribunal could reasonably be drawn from the primary facts, having regard to the burden of proof. That involved an assessment of the medical evidence. Where the scientific origin of the disease was known, there should be little difficulty in stating the causes of the disease and of any aggravation of it, but the cases where the ætiology was unknown or imperfectly known presented great difficulty. If nothing else appeared except that the cause was unknown, the only proper conclusion was that the Minister could not discharge the burden of proof because the unknown cause might be a cause incidental to war service. In many cases, however, although the ætiology was unknown, experience and statistics were able to throw light on the circumstances in which disease arose or developed. The present case was regarded as a test case of cancer of the œsophagus. The ætiology of cancer was unknown. In spite of all research, medical men had not been able to find out the origin of the disease so as to demonstrate, as a matter of science, how it arose. Such knowledge as they had of its cause, and it was very little, was based not on science, but on experience and statistics. One doctor thought that carcinoma of the œsophagus might have resulted in the present case from an irritant in food, swallowed in the Middle East, such as sand. That suggestion was, however, rejected by other doctors because of the rarity of cancer of the œsophagus in men serving in the desert. There was evidence, based no doubt on experience and statistics, that for all practical purposes cancer was not looked on as contagious or infectious; and that cancer of the œsophagus was unrelated to employment or environment. There was also the striking fact that there had been apparently forty-five cases only of cancer of the œsophagus among men in the services from all theatres of war, including the United Kingdom, between 1939 and 1946, a minute fraction of the total number of cases reported in the United Kingdom every year. The very fact that, in spite of the close attention which had been given to the problem, experience and statistics could point to no external factor seemed to support the view that in general cancer pursued its inevitable and inexorable course without being influenced by the intervention of external factors or agencies. There remained the doubt, however, due to its unknown ætiology, that it was possible that war service played some part. Medical opinions were given that it could not be stated with any degree of certainty that service factors had played no part, and that it was impossible to assert that nothing whatever in the environment had an influence in causation. The question was what degree of doubt those opinions imported. Did they give rise to a reasonable doubt or not? That was essentially a matter for the tribunal. The weight to be attached to the various opinions and the assessment of the degree of probability were essentially matters for the tribunal. They came to the conclusion that the whole of the probabilities were that war service played no part. They recognised the existence of a possibility the other way, but dismissed it as too remote. He (his lordship) could not say that they could not reasonably come to that conclusion, and the appeal would be dismissed.

COUNSEL: *Crispin*; *H. L. Parker*.

SOLICITORS: *Culross & Trelawny*; *Treasury Solicitor*.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

RECENT LEGISLATION

STATUTORY RULES AND ORDERS, 1947

No. 1804. **Currency Restrictions and Travellers Exemptions** Order. August 21.

No. 1773. **Double Taxation Relief** (Taxes on Income) (British Guiana) Order in Council. August 8.

No. 1774. Double Taxation Relief (Taxes on Income) (Cyprus) Order in Council. August 8.

No. 1775. Double Taxation Relief (Taxes on Income) (Mauritius) Order in Council. August 8.

No. 1776. Double Taxation Relief (Taxes on Income) (New Zealand) Order in Council. August 8.

No. 1777. Double Taxation Relief (Taxes on Income) (Northern Rhodesia) Order in Council. August 8.

No. 1778. Double Taxation Relief (Taxes on Income) (Seychelles) Order in Council. August 8.

No. 1779. Double Taxation Relief (Taxes on Income) (Trinidad) Order in Council. August 8.

No. 1811. **Export of Goods** (Control) (Amendment) (No. 4) Order. August 21.

No. 1833. **Food** (Licensing of Retailers) (Amendment No. 2) Order. August 22.

No. 1755. **National Health Service** (Superannuation) Regulations. August 12.

No. 1807. **Prices of Goods** (Price-Regulated Goods) (Amendment) Order. August 19.

[Any of the above may be obtained from the Publishing Department, S.L.S.S., Ltd., 88/90, Chancery Lane, London, W.C.2.]

NOTES AND NEWS

Honours and Appointments

Mr. HOWARD DEIGHTON LAY has been appointed High Bailiff of the Isle of Man.

Mr. ERIC BELLINGHAM, Town Clerk of Stockton-on-Tees, has been appointed Administrator and Legal Officer of the Hemel Hempstead Development Corporation. He was admitted in 1928.

Mr. J. E. P. MORRIS, solicitor, of Haverfordwest, has accepted an invitation by the Minister of Health to become Chairman of the Executive Council for the County of Pembroke under the National Health Service Act, 1946. He was admitted in 1909.

Mr. W. MORGAN, of Whitehaven, has been appointed Second Assistant Solicitor to Newcastle Corporation. He was admitted early this year.

The following appointments are announced in the Colonial Legal Service: Mr. D. H. CHAPMAN to be Assistant Official Assignee, Malaya; Mr. J. V. M. SHIELDS to be Crown Counsel, Malaya; and Mr. J. B. HOBSON, Crown Counsel, Uganda, to be Solicitor-General, Kenya.

Mr. D. C. JACKSON has been appointed Legal Secretary, British Somaliland, and Mr. R. W. S. WINTER Legal Secretary, Falkland Islands.

Notes

The following additions have been made to areas covered by rent tribunals: *Bath*: borough of Marlborough, urban districts of Melksham, and Trowbridge, rural districts of Marlborough and Ramsbury, Bradford and Melksham, Malmesbury, Amesbury, and Calne and Chippenham; *Bristol*: rural district of Thornbury; *Cheltenham*: rural district of Martley; *Colchester*: rural district of Gipping; *Croydon*: rural district of Godstone; *Derby*: urban district of Ashbourne; *Doncaster*: urban district of Hemsworth; *Farnborough*: borough of Andover; *Huddersfield*: borough of Brighouse and urban district of Holmfirth; *Leicester*: urban district of Ashby-de-la-Zouch; *Lincoln*: rural district of Welton; *Newcastle-upon-Tyne*: urban district of Whitley Bay; *St. Austell*: urban district of Padstow; *Southend-on-Sea*: urban district of Rayleigh; *Watford*: urban district of Tring, rural district of St. Albans.

Wills and Bequests

Mr. C. S. Bigg, solicitor, of Leicester, left £38,407.

Mr. G. H. Charsley, retired solicitor, of Harpenden, left £43,790. He left £1,000 to the London Orphan School, Watford.

Mr. W. Firth, solicitor, of Bradford, left £61,971.

Mr. O. B. Steward, solicitor, of Sheffield, left £16,977.